No. 41579-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TONY K. WHITE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable James R. Orlando, Judge

APPELLANT'S OPENING BRIEF

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1. Appellant Tony White's due process rights to be free from having to disprove the state's case were violated when the prosecution told jurors to draw a negative inference based upon his failure to present certain evidence.

2. In the alternative, the sentencing court erred in imposing a term of 24 months of "flat time" for a sentencing enhancement where the jury did not make the required factual finding for that enhancement.

3. Also in the alternative, Instruction 25, the instruction on the special verdicts, was improper under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and violated White's rights to the presumption of innocence and the benefit of any reasonable doubt. Appellant assigns error to that instruction, which provides, in relevant part:

> If you find the defendant guilty of a particular one of those crimes, you will then use the special verdict form pertaining to that crime, and fill in the blank with the answer "yes" or "no" according to the decision you reach. **Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms.** In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. **If you unanimously have a reasonable doubt as to this question, you must answer "no."**

CP 80 (emphasis added).

4. White was deprived of his constitutionally guaranteed rights to effective assistance of counsel when counsel failed to be aware of the relevant law even though the controlling case was decided four months before trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. White was accused of, *inter alia*, selling crack cocaine to a man working as an informant for police on a particular day. The prosecution presented no evidence of what time they alleged that transaction had occurred. White testified that he was not home most of the day, detailing going to make a car payment and working on a car away from the house. The trial court refused the prosecution's request for a

"missing witness inference" instruction for a friend of White's who had driven him somewhere on the day in question, saying that inference did not apply.

Did the trial court err and were White's due process rights to be free from having to disprove the state's case violated when the prosecution was allowed to argue in closing that the jurors should draw a negative inference from White's failure to call the witness?

2. A sentencing court is limited by the jury's findings on a special verdict form and may not impose an enhancement which is not supported by the jury's findings without violating the defendant's due process and jury trial rights.

White was alleged to have committed two of the crimes within 1,000 feet of a "school bus route stop" properly designated by the school district. For count II, however, the special verdict form asked the jury to decide only if White had possessed a controlled substance with intent to deliver it "at any location." CP 82A.

Did the sentencing court err and exceed its authority in imposing a 24-month enhancement for Count II based upon the state's allegation that the possession with intent had occurred within the specific required location for a "school bus route stop" enhancement even though the jury was not asked to and did not make the findings required to support such an enhancement?

3. Under Bashaw and consistent with the principle that the defendant is entitled to the benefit of any reasonable doubt under the presumption of innocence, a jury need not be unanimous in order to find that the state had not met its burden of proof on a special verdict and thus answer the special verdict "no."

Was jury instruction 25, the special verdict instruction, defective under Bashaw, because the instruction told the jurors they had to be unanimous in order to answer the special verdict either "yes" or "no"?

Further, did the improper instruction deprive White of the rights to the presumption of innocence and the benefit of all reasonable doubts?

Should this Court refuse any effort by the prosecution to deny White relief based upon conflicting caselaw in other Divisions?

Was counsel ineffective in failing to object to the improper instruction and thus allowing his client's rights to be violated even though Bashaw was decided four months before White's trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Tony K. White was charged by amended information with delivery of a controlled substance with a school bus route stop enhancement, unlawful possession of a controlled substance with intent to deliver, also with a bus stop enhancement, unlawful use of a building for drug purposes and unlawful possession of marijuana. CP 5-7; RCW 9.94A.533(6); RCW 69.50.101(q); RCW 69.50.401(1)(2)(a); RCW 69.50.4014; RCW 69.50.435; RCW 69.53.010.

Trial was held before the Honorable James R. Orlando on and 10th and 19th, 2010, after which the jury found White guilty as charged. RP 418;[1] CP 81-87. On December 3, 2010, Judge Orlando ordered White to serve mid-range sentences which included two 24-month "flat time" periods for a total of 48 months for enhancements for school bus route stop on counts I and II. RP 542, 545.

White appealed and this pleading follows. See CP 111.

2. Testimony at trial

On January 19, 2010, Darien Williams was working to avoid punishment for his own drug deliveries when he went into a duplex, out of sight of officers, to try to buy drugs in Tacoma. RP 133, 137, 146, 155,

[1]The verbatim report of proceedings consists of five volumes. The four chronologically paginated volumes containing the trial and sentencing will be referred to as "RP." The fifth volume contains the opening argument and will be referred to as "ORP."

211. Williams had been searched and given prerecorded "buy money" and went in the door alone. RP 133, 146, 231. Neither of the officers involved in the "buy" operation could see who answered the door and let him in, although one officer, Kory Shaffer, first claimed he knew or had "an idea" about what happened at the door. RP 147, 155. Ultimately, Shaffer, who was around the block at the time, conceded that he had not seen Williams at the door and did not know if the door was opened by someone or if Williams had just walked in. RP 155. Shaffer's partner, Ray Shaviri, also conceded that he did not see anyone open the door but thought that Williams did not "just walk into the door." RP 42. Shaviri did not see anyone open the door, however. RP 15, 23, 42. Neither officer saw anything of what happened inside when Williams claimed he bought the drugs from a man officers thought was Tony White. RP 42, 43, 133, 155, 215-18.

The transaction was one of the first Williams had done for police - a test of Williams' "reliability" as an informant. RP 138, 142. Williams, who had four separate counts of delivery of drugs in the time from June 1-July 14, 2009, was given a "deal" where, if he incriminated enough people or brought in enough quantities of drugs, the prosecutor's office would recommend that the sentencing judge not give Williams the 20-60 months in prison he was facing and would instead ask for Williams to be released for time served. RP 140-41, 226.

Williams said that, when he went to do the "deal," he was searched, got into a police car with Shaviri, was dropped off at a duplex and either some guy Williams had never seen before or a woman later

identified as Misty Navensken had answered the door. RP 219, 237. According to Williams, he had previously spoken to someone on the phone about buying drugs and he thought it was a man named "Tony," although when Williams went to the door he told whoever answered that he was there to see Navensken or "Tony." RP 220. Once inside the home, Williams went up the stairs and, he said, to "Tony's bedroom" and "saw Tony," who took a little metal mint container out of his pocket and gave Williams one "stone" or "rock" of cocaine for the $20 Williams had. RP 220-21. Williams then left and Shaviri picked him up, driving to where they were supposed to meet up with Shaffer. RP 221.

Williams was sure that, during the drive, he did not give the drugs to Shaviri. RP 221. In fact, Williams was "for certain" that he kept them until he met up with Shaffer, then gave them to Shaffer. RP 221, 222, 237.

Shaviri, in contrast, was sure that Williams had given him the drugs right when he got back into the car. RP 30. Shaviri also said he conducted tests on the drugs before then giving them to Shaffer. RP 31. Shaffer said that, when the two men met up with him, Shaviri had been the one to hand over the suspected drugs, after which Shaffer did testing with a little swab and rubber gloves to see if it was apparent narcotics. RP 61-64.

Williams was clear that he did not see either officer do any tests on the suspected drugs. RP 238-39.

Williams testified that, when he was negotiating his deal with police, he had advised Shaffer of "potential targets" including someone

named "Tony," who he identified at trial as White. RP 214. Shaffer claimed that White was a target even "prior to the meet" where Williams agreed to target White. RP 55-56, 147. Another target was Navensken. RP 215.

Indeed, Williams said that he did not "even really know Tony" but just knew Nevansken, who had given him her phone number and one for "Tony." RP 215, 229, 242. Williams thought Nevansken was "Tony's" girlfriend and said that he met "Tony" through Nevansken, although he could not "be exact about time." RP 242, 368. A moment later, however, Williams admitted that he had never met Tony White before the day when he said White had sold him the "rock" at the home. RP 241-42. He said he had "never seen" the man he thought was "Tony" before the day of the "buy." RP 242.

Indeed, Williams declared, "[b]efore that buy, I had never seen him, never knew him." RP 242. Shaffer was sure that Williams had claimed, when talking to Shaffer, that he had met "Tony" prior to the "buy." RP 276.

Shaffer admitted that Navensken was a target because Williams said he had purchased drugs from her in the past. RP 179. Williams had, in fact, given Shaffer "Misty" as a first name of someone he could target for police. RP 182.

Nevansken had sold drugs to Williams from the very same house where Williams had gone at the time of the "buy" in January. RP 182.

In the police report, the only description listed of the person Williams had said he had bought drugs from was named "Tony" and that

he was Asian/Pacific Islander, without giving information on weight, height, facial hair, hairstyle, tattoos or anything more definitive. RP 148-49, 233. Shaffer claimed that Williams had given a more detailed description - one which apparently was closer to Tony White and included that the man was in his 30s, an Asian male, had black hair and wore a ponytail. RP 274. Shaffer did not explain why his report did not include such crucial information, but claimed he "most certainly did document" it somehow, somewhere else. RP 277.

At some point after the "buy," Shaffer admitted, the officer showed Williams a single photo of a man and asked if that was the man who had sold Williams the crack. RP 149-50. Shaffer said he did not think to use a montage of similar looking men. RP 149-50.

It was only at that point that Williams learned the last name of the person he thought was involved was "White." RP 149-50, 234.

On February 17, 2010, approximately ten officers including Shaffer served a search warrant on the duplex apartment.. RP 100-101, 156. One of those officers, Byron Brockway, said the search occurred at 7 in the morning and that no one answered for 10 or 15 seconds after he shouted "[p]olice. Search warrant. Open the door." RP 247. As a result, Brockway rammed the door tool into the door, forcing the door off its hinges to get inside. RP 248. Brockway said there was a reinforcement on the door with a piece of wood which had been propped up to brace the door shut. RP 249.

Inside the home were White, a man named Charles Williams (unrelated to the informant), a woman named Sheila McCully and

someone named James Marlow. RP 182, 298. Shaffer arrested White and asked who was staying or living there. RP 108-109. According to Shaffer, White said he had a room, McCully had a room, and Navensken had moved out "a couple weeks ago" because they no longer got along. RP 108-109.

Two black males were sitting on the couch in the living room when police entered and it was unclear if they were Charles Williams and James Marlow. RP 118, 249. Under that couch or one next to it, police found two "crack" pipes and a "baggie." RP 118, 349. McCully was arrested coming out of the bedroom off to the right and, according to one officer, White appeared to be walking out of the bedroom off to the left (the "northeast" bedroom). RP 298, 349, 364. All four were taken into custody. RP 182-83.

After reading White his rights, Shaffer admitted, White told the officers he had marijuana in his pants pocket and some prescription cold pills for his cold. RP 103-107, 428, 437. Shaffer conceded that, in fact, he found those items in White's pockets when he was searched. RP 107. White had some cash, too, which was about $290. RP 107.

The house was not organized and there was "disarray" and clothing "all over the place" in different areas. RP 266. Beds were unmade, there were things all over the dressers and closets were seriously messy. RP 267. Numerous "brown-colored" moving boxes were on the side of the living room, stacked up. RP 318, 323.

In all this mess, an open package of sandwich bags was found in the living room coffee table and an officer opined that such bags are often

used to package drugs. RP 118.

The northeast ("NE") bedroom was first searched by a "K-9" handler and a dog trained in finding narcotics. RP 346. The dog alerted on a very small red plastic container which had white powder residue on it that tested positive later for cocaine. RP 117, 351, 391. The container was on top of a printer, which was sitting on a desk in the room. RP 121, 251, 351-52. Also in the desk, officers found a plastic "baggie" with white residue. RP 117.

The room was "unkempt," "fairly dirty," and had "clothes or papers or things strewn around" all over. RP 358. The handler officer said there was so much stuff on the floor he could not see it. RP 359. The dog did not find anything else until he was put in to search inside a "very, very cluttered" closet which the K-9 handler officer described as "full of all kind of clothes and all kinds of other household items." RP 352. There was no door to the closet and it was just piled with stuff. RP 359.

In fact, there was so much clutter in the closet that the handler had to put the dog in the closet by lifting him in and the handler actually could not follow behind. RP 352-53. At one point when the dog wanted to sit down, he could not do so because there was too much stuff on the floor. RP 362.

The dog started working its way back in the closet and the handler officer "had to go in, move some things out of the way" because there was some stuff "actually impeding his progress to the back corner." RP 353. One of the things the handler moved was a "small shelving-type unit" or end table. RP 360. The dog then seemed to be breathing a little more

heavy and nuzzled something, then gave an indication to the handler that he had found something. RP 354.

The handler then "crawled all the way to the back corner where he was" and shone a flashlight in and saw a "small baggie of white rock substance." RP 354. The handler did not remember if they were all separated or one large clump of "rock" but it was all in one bag. RP 361.

The handler admitted that, in fact, before he sent the dog into the closet, he could not observe the baggie from his vantage point. RP 361. He also could not see it at the time he moved the shelving out of the way, and could not see it even once he had done so. RP 361. He could not see what the dog was focused on when the dog tried to sit down and, when the officer himself looked where the dog was indicating, the officer had to use a pretty bright flashlight to see it. RP 362.

The handler said he did not "tuck it back in under - - back under the clothes" and did not "cover it back up with clothes." RP 355. Confusingly, he also said he did not recall that he had moved "any items that were on top of it or around it" to get to it. RP 364.

The closet bag contained 6 smaller bags of suspected crack cocaine which weighed out to about a total of 43 grams of "crack." RP 117-127, 273. Shaffer opined that this amount of crack was "not consistent with personal use at all." RP 128. He also said some of the rocks were bigger than he would normally see sold on the street and he assumed they would be broken down into smaller rocks at some point. RP 131. It also appears that there was a bag of smaller rocks in the closet, too, although there was some confusion because Shaffer admitted that he had repackaged some of

the drugs and did not know where the original outer bag was. RP 167-68.

The two bags which had contained the suspected drugs and the red container were sent for latent print testing. RP 168, 198. White's fingerprints were not found. RP 168, 202.

A forensic scientist tested only one of the six "baggies" in the big bag and said it contained 6.4 grams of something containing cocaine. RP 389-95. Another baggie tested - likely the one containing the smaller "rocks" - was 5.4 grams and contained cocaine. RP 393-95. The scientist said he did not test all the baggies because they all "appeared the same." RP 401-403. He admitted, however, that he had come across things which were not real drugs but looked like drugs before and thus could not give any opinion about any of the baggies he did not test. RP 404.

Also found inside the NE bedroom was identification for a man named "Sean Larson." RP 159, 268, 327. Shaffer nevertheless stated his "knowledge" that two cell phones found on the floor in the bedroom were White's because they were taken into custody "in that bedroom where he was taken into custody." RP 161, 327. But Shaffer admitted that White's wallet and identification were not found in that same bedroom, while Larson's were. RP 161, 272. Shaffer just assumed the items were White's. RP 161.

An officer who did a search of the NE bedroom said he did not recall any women's clothing there. RP 267. When confronted with a photo of the closet, however, he admitted that, in fact, the closet had at least one item inside which looked like it might be a women's shirt. RP 271. Another officer said he "did not take note" of the type of clothing

hanging in the closet or in the bedroom. RP 364.

The room had a lot of stuffed animals in it, as well. RP 271-72.

A surveillance monitor was on the desk in the NE bedroom, a camera was mounted on the "upper newel post" at the top of some inside stairs, and what appeared to be a camera eye was mounted above the front door on the outside of the duplex. RP 115-18, 251-52, 335. Although the prosecutor presented testimony from the owner of the building, Dolores Levet, that she had leased to White and someone she thought was "Danielle Sews," and whether they were paid up on the rent, the state never asked if she was the one who had installed the monitor and cameras or if she knew who had. RP 275-82.

Another officer who was in the NE bedroom said she found some "documents and crib notes" that were "scattered around the room." RP 328. One of them was a "three-day notice to pay rent or vacate" that the landlord said she had issued to the apartment in January. RP 279, 329. The eviction had not gone forward because the landlord had been paid off by White in cash. RP 279, 329.

Also in the room, among the other items, was an insurance card in White's name with the address of the duplex, a letter to White, and a receipt in White's name for making a payment on someone's account at Pierce County jail. RP 329-32.

None of those documents was dated later than December of 2009, several months before. RP 423-24.

Separate from those documents were a few loose pages the officer described as "crib notes," which had names and what appeared to be dollar

amounts on them. RP 332-33. There was one notation which said "pills." RP 333. White's name was not on it anywhere. RP 333.

A notebook was found in that bedroom. RP 340. It had several pages ripped out and some that had some ripping on them but were still in the book. RP 340. Names and numbers were on a few pages but there were no dollar signs or anything. RP 340-41. The numbers and names in the notebook included names of people like "Melissa Etheridge" and "Silent Legacy," neither of which did White know were musicians or musical groups. RP 445-46.

The cover of the notebook said on it "Misty Ann" and then a last name with something like Davis or ending in Baker. RP 339, 341. The name "Sean Larson" was also in the book. RP 342. Of the roughly ten pages written on in the book, neither the name "Tony" or "Tony White" were there, nor even the initials "TW." RP 342-43. An officer thought it looked like there were possibly two or three people writing in the book but much of it was consistent with the handwriting of the name "Misty Ann." RP 343.

The search warrant sought was both for White and for Navensken. RP 368. Navensken was in the apartment the day of the "buy," when Williams claimed White had sold him the "rock." RP 243.

After the charges were filed, Shaffer testified, he measured the distance from a bus stop which a router said was a "school bus" stop to the house with a wheeled measuring device. RP 78, 98. Indeed, he said, "I physically wheeled it off." RP 72. He then guesstimated that the distance from the sidewalk to the door of the house was "15 to 20 feet-ish," the

distance from the front to the back of the house as "no more than 40 feet" and said he thought the house, which was two stories high, appeared to have "standard eight-foot ceilings." RP 76-77, 98-100.

In fact, Shaffer ultimately admitted, it was another officer who had actually "wheeled off" the distance, while Shaffer drove alongside in his car. RP 75, 151. Shaffer nevertheless said he was the one who had "calibrated" the device, and he did so by putting a one-foot ruler on the ground and then moving the wheel along it to see if it "clicked off" 1 foot. RP 152. He did not attempt to measure any distances other than the one measured by the other officer. RP 153. That officer, Byron Brockway, testified that the distance was 881 feet. RP 263. He also thought Shaffer had used a tape measure to calibrate it but did not know the distance of anything. RP 264.

White testified that he had rented the apartment, one part of a duplex, around summer of 2009, and that his name was on the lease. RP 420. When he moved in, there were two other people who moved in, too: Danielle Sears and Randall Baker, although only Sears was on the lease. RP 421, 436, 443-44. Other people would also stay over in the living room or bedrooms, and Nevansken moved in, too, about a month after they leased the apartment, without being on the lease. RP 421, 444. McCully, who had one of the bedrooms and had lived there for about four months, was not on the lease, nor were James Marlow, Karen Baker, Sean Larson and a "Steve somebody" who were living there on a regular basis. RP 175, 437, 444. As a result, White was not the "only one that was responsible" for what went on in the apartment. RP 443-44.

White was clear that he never met Darien Williams and did not have any contact with him or sell him drugs either on January 19, 2010, or any other day. RP 429-30. Indeed, White said, on January 19, he was fixing his truck for work, trying to get it "up and running to start the new contract" he was supposed to begin. RP 430. White described doing the repairs somewhere else, starting at about noon and ending after midnight. RP 430, 440. Before that, he said, he had been given a ride to Tukwila to make a car payment. RP 441.

When questioned about the days around the day of the alleged "buy," White was able to give specifics: he knew that he was at a barbecue on January 18, which he thought was a Saturday, and on January 16, he thought he was at an auto supply store, Schuck's, getting a part. RP 439. On January 14 he was talking to a mechanic about getting a "code reader" for his vehicle, and it was January 12 that his truck broke down. RP 439. On January 20 he thought he was out in Graham working in a shop and on January 21, he was in Everett locating some contacts. RP 440. White explained that, while he did not take notes of everything he did everyday, he had a "set route" he took every day during the week. RP 440.

White said he was moving out and the others were going to stay, which is why there were moving boxes in the home. RP 425. White said he did not know if Nevansken, who had been paying rent, was one of those who was staying even though he had essentially kicked her out on February 12, 2010. RP 434. That date was actually Nevansken's birthday and they all had a "falling out," so Sears and White told Nevansken to leave. RP 435, 443.

White said that, when he had "showed up" at the home the morning the officers searched, Sears and Baker were in the NE bedroom. RP 427. They had left just ten minutes before police arrived. RP 427.

When the officers came into the home, White was out of sight behind the TV, sitting in front of a doorway, and could not see the officers. RP 426. He heard them, however, saying, "[i]s anybody here? Is anybody here?" and then "[c]lear, clear." RP 426. White "didn't want to get shot" so he stood up. RP 426. He was in "the proximity of" the NE bedroom but not inside it. RP 426.

White did not dispute that a few documents were found in the bedroom with his name on them, and freely admitted that one of the cell phones in the bedroom was his. RP 431-32. He had also freely admitted that he was carrying marijuana when he was arrested. But White was also clear that he had not seen the "rocks" of cocaine found by the police, either in the NE bedroom or anywhere in the home. RP 427-28.

The notebook with "Misty" on the cover was not White's, and he said he had not written in it or directed anyone to make any of those writings. RP 424.

White said he was "aware that drugs were being purchased from that residence" but he was not the one doing the selling. RP 429. White does not use cocaine or crack now and was not doing it in 2010, although he used it at some point in 2009. RP 434. White said he had no plans to use any of the cocaine in the apartment and did not know it was there. RP 434.

D. ARGUMENT

1. REVERSAL AND REMAND FOR A NEW TRIAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO MAKE IMPROPER ARGUMENT FAULTING WHITE FOR FAILING TO PRESENT EVIDENCE

A defendant has no duty to call a witness, and the absence of that duty is a "corollary of the State's burden to prove each element of the crime charged beyond a reasonable doubt." State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990). This burden of proof is enshrined in the federal and state constitutions. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), reversed on other grounds on petition for writ of habeus corpus sub nom Hanna v. Riveland, 87 F.3d 1034 (9th Circ. 1996); 14th Amend.; Art. 1, § 3. Indeed, it is misconduct for a prosecutor to argue that a defendant has a duty to present exculpatory evidence, as this shifts the prosecution's burden to prove its case onto the defendant - to *disprove* it. See State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990), review denied, 15 Wn.2d 1029, cert. denied, 499 U.S. 948 (1991).

There is a very limited exception which applies only in certain circumstances, called the "missing witness" inference. See State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). Under that exception, where a party fails to call a witness who is "peculiarly available" to that party and whose testimony the party would naturally and necessarily present as an important part of their case, an inference may be drawn that the party failed to call the witness because the testimony would in fact not

be favorable. See State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

Although proper use of the "missing witness" inference does not amount to a per se impermissible burden shift, there can be such a shift where the inference does not apply. Blair, 117 Wn.2d at 488-89. Thus, in criminal cases, reviewing courts should strictly construe the inference and carefully scrutinize any comment allegedly made under the inference, because of the important constitutional rights involved if the inference does not apply. See id.

In this case, the trial court held that the missing witness inference did not apply. RP 452. It nevertheless allowed the prosecution to argue - over defense objection - that the jury should apply a negative inference from White's failure to present certain evidence which would have disproved the state's case. RP451-53, 522. The trial court erred in allowing this argument when the missing witness inference did not apply, and the result was that White's due process rights to have the state prove its case beyond a reasonable doubt were violated.

a. Relevant facts

In cross-examination, White testified that, on the morning of January 19, before he went to work on his car, a friend, Vernel Rucks, took White to Tukwila to make a car payment and drop him off. RP 441. White made it clear that Rucks was not with him all day that day but just for a short time in the morning. RP 441. The prosecutor then went on:

Q: And you were aware that you were charged with delivering a controlled substance on January 19th. Correct?

A: Yes, that's correct.

Q: And you have been aware of that for a very long time, correct?

A: No. That's not correct. I have recently been charged.

Q: You have known about it for more than a month?

A: I would say probably two, three months.

Q: Two or three months?

A: Yes.

Q: Okay. And you knew that on that day, at least in the morning, that you were with this person, this Vernel Rucks. Correct?

A: Yes.

RP 441-42. The prosecutor then established that White had known Rucks for about 15 years and had been friends with him and seeing him daily or talking to him on the phone. RP 443. Counsel objected to the relevance of the questioning but that objection was overruled. RP 443.

Later, with the jury out, the prosecutor asked for two additional instructions to be given to the jury. RP 448. One of the newly proposed instruction he said he would request was a "missing witness instruction" for Vernel Rucks. RP 448. Counsel objected that "we have absolutely no control over that individual" and the missing witness inference thus did not apply. RP 449. The prosecutor argued that Rucks was "uniquely within the control of the defendant, and, therefore, the defense," because White knew the man well and talked to him all the time on the phone. RP 450.

When the court asked about the the timing of the January 19th buy,

the prosecutor said "I don't think that there was a time mentioned" when the transaction was supposed to have occurred. RP 451. The court then said that, because of the absence of any evidence as to the specific timing of the crime, the judge did not know whether Rucks' testimony would even be relevant, for example if the "alleged delivery occurred in the afternoon when Mr. White's not claiming he was with Mr. Rucks." RP 452. The court expressed concerns about "burden shifting" but said the prosecutor could argue "that the jury can assess the defendant's version of the events just like they would a version of any other witness." RP 452. The court concluded:

> I don't think Mr. Rucks is of such a - - such a person who was under the control of the defendant that would it [sic] be proper to give a missing witness instruction.
>
> So I am not going to grant a missing witness instruction.

RP 452. The prosecutor then asked if the court was "precluding" him from arguing that the witness is not here and the court said the prosecutor had to "be cautious to not be in a position where you are impliedly shifting the burden to the defendant." RP 453.

In rebuttal closing argument, the prosecutor focused on White's "credibility" and then said that White had testified about being out fixing his truck in the afternoon and all evening until after midnight at the time that Williams said he bought the drugs. RP 522. The prosecutor then reminded the jury that there was "**[n]o one to corroborate that, although he's know for months that he was facing a charge committed on that date.**" RP 522 (emphasis added). The prosecutor then pointed out that,

although White said he was with Rucks in the morning, White had Rucks' phone number, knew where he lived and how to contact him, "**[y]et Mr. Rucks is not here. Even though the defendant knew that he was facing this charge alleged to have been committed on that day.**" RP 522 (emphasis added). The prosecutor told the jury to consider the fact that White had not brought Rucks as a witness "in deciding whether or not the defendant's testimony is believable" and thus should be acquitted. RP 522.

b. The court erred and violated White's due process rights in allowing this improper argument

This Court should reverse and remand for a new trial, because the trial court erred and White's due process rights were violated when the prosecutor was allowed to argue that the defendant somehow failed in his burden of proof and thus his denials of guilt should not be believed. As a threshold matter, there is no question that the trial court correctly found that the inference did not apply. A witness is not "peculiarly available" to a party just because they are friends or know each other really well. See, State v. David, 118 Wn. App. 61, 67, 74 P.3d 686 (2003), remanded on other grounds, 154 Wn.2d 1032, 119 P.2d 852 (2005), on remand, 130 Wn. App. 232, 122 P.3d 764 (2005), remanded on other grounds, 160 Wn.2d 1001, 156 P.3d 903 (2007), on remand, 140 Wn. App. 1018, 2007 WL 2411693 (2007); see e.g., State v. Valentine, 587 S.W.2d 859 (Mo. 1989) (where evidence only established a friendship relationship, and the prosecution failed to show it was unable to ascertain the witness' name or location, the witness was not "peculiarly available" to the defendant).

Further, the inference is not available if the testimony of the witness would be cumulative or not relevant to important parts of the case. Blair, 117 Wn.2d at 489. And as the trial prosecutor himself admitted, the prosecution did not present any evidence establishing the time or time of day the alleged sale was supposed to have occurred. See RP 451. Thus, the prosecution - the proponent of the inference - could not have established that the testimony would somehow be relevant to prove an "alibi," instead of being impeachment on the collateral matter of what he had done during other parts of his day (i.e., gone to make a car payment in the morning or worked on his car in the afternoon).

After making the correct ruling excluding the inference instruction, however, the trial court then erred in allowing the prosecutor to draw a negative inference from White's "failure" to present Rucks as a witness anyway. Blair made it clear that, while proper use of the inference when it applied does not amount to an impermissible shifting of the burden of proof, there can be such a shift if argument is made about the defendant failing to present certain testimony when the inference does not apply. Further, it is questionable whether it is proper to allow argument applying a "missing witness" inference when the inference does not apply and no instruction on the inference is given. See State v. Frazier, 55 Wn. App. 204, 211-12, 77 P.2d 27 (1989).

Here, while the prosecutor tried to couch the argument as merely argument about "credibility," it was all about White's failure to present evidence to rebut the state's case. With his comments, the prosecutor told the jury that it should not believe Mr. White's version of events, because if

he was telling the truth, he would have presented Rucks as a witness. The obvious inference was that he was lying about not being at the home and not being guilty, because he failed to present testimony from a witness who could have corroborated his denials. Yet there was no indication that Rucks would have actually provided relevant testimony. The prosecution's failure to prove when the alleged "buy" had occurred on the relevant day precluded it from being able to establish that Rucks would have been a witness White would have called.

Thus, the prosecutor used White's failure to present evidence as "evidence" that White lacked credibility in denying his guilt. See, e.g., Thomas v. United States, 447 A.2d 52, 58 (D.C. 1982) (missing witness inference essentially "creates evidence from non-evidence" at the risk that the jury will give undue weight to that "evidence").

As one court has noted, the inferences drawn from introducing the idea of a "missing witness" are "powerful," and suggest to the jury "not only that the evidence allegedly withheld would have been unfavorable" but also that the defendant had wilfully attempted to conceal or withhold it. Com. v. Gilberti, 748 N.E.2d 982, 990 (Mass. App. Ct.), review denied, 757 N.E2d 729 (2001). Where, as here, the case involves credibility and there is argument made about a failure to present evidence by the defense when the "missing witness" inference did not apply, the argument is especially prejudicial. See Thomas, 447 A.2d at 59.

Reversal and remand for a new trial is required. Where, as here, the error involves the prosecution's shifting a burden of proof to the defendant to provide evidence to disprove the state's case, it involves a

violation of the constitutional rights to due process . Under the constitutional harmless error test, this Court must presumptively reverse for such error unless and until the prosecution meets the very heavy burden of proving that the error was "harmless." State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Error is only "harmless" for this purpose if the untainted evidence is so overwhelming that it necessarily would lead to a conviction regardless of the error. 104 Wn.2d at 426. And this test is far, far different than the one used for cases involving questions of sufficiency of the evidence. In sufficiency cases, the question for the reviewing court is whether, taking the evidence in the light most favorable to the state, *any* reasonable jury could possibly have convicted - a very forgiving and liberal standard for the state. See State v. Romero, 113 Wn. App. 779, 786, 54 P.2d 1317 (1993). Only the minimum is required to uphold the conviction, because the test is not whether even the *average* reasonable jury would have convicted but whether *any* reasonable jury would have convicted, thus requiring such an extreme lack of evidence that it is inconceivable anyone would have convicted.

In stark contrast, the constitutional harmless error test requires proof that *every* reasonable jury would *necessarily* have convicted even absent the error - in other words, evidence so "overwhelming" that it was impossible to conceive that anyone could have possibly had a doubt about guilt and thus failed to convict. See State v. Evans, 96 Wn.2d 1, 7, 633 P.2d (1981). This evidence is far, far more than the minimum required for a sufficiency challenge, something Romero makes clear. In that case, the

defendant was charged with having unlawful possession of a firearm after shots were heard being fired near a trailer home in a mobile home park. 113 Wn. App. at 784. Romero was seen near the home, ran from officers, was found near a shotgun and some shell casings, looked like descriptions of the man, and was identified by an eyewitness who was relatively sure of the id. 113 Wn. App. at 784. The Court upheld the conviction against a sufficiency challenge, finding the evidence ample to meet that test. Id.

But the same evidence was *not* sufficient when weighed in light of a prosecutor drawing a negative inference from the defendant's exercise of his right to remain silent. 113 Wn. App. at 795-96. Because Romero had denied guilt and disputed the evidence, the Court said, the jury was faced with questions of credibility which could have been affected by the error. Id. Put another way, there was no way to say beyond a reasonable doubt that the jury would necessarily have convicted if the inference had not been drawn, because the jurors could well have evaluated credibility differently. Id. As a result, the Court held, the constitutional harmless error test was not met.

Nor is it met here. The evidence against White for the delivery and possession with intent was thin. While there is no question that White lived in a place where drugs were ultimately found, so did another person, also a suspect as a drug dealer and who Williams said had sold him drugs before -Nevansken. She was in the home when the "buy" supposedly occurred. She was a "target" for police, too. And Williams admitted that he did not really know White but had dealings with Nevansken.

Further aside from Williams' word, there was nothing proving that

it was White, not Nevansken, who sold Williams the $20 worth of crack. The officers did not even see who opened the door, let alone who conducted the deal.

In addition, the drugs which White supposedly "possessed with intent to deliver" were in a bedroom where there were stuffed animals, another man's identification and some women's clothing in the closet. It was not White's name on the alleged "drug record" book - it was Nevansken's. Indeed, White's name was not anywhere on it or in it. Nor were White's fingerprints found on the drugs. And there was no evidence that the monitors and cameras were installed by or in any way linked to White, because the prosecution failed to ask the landlord anything about it.

Most importantly, White's statements that he was not aware of the quantity of drugs hidden in the very back bottom of the closet in the NE bedroom was substantially corroborated by the machinations required for police to find those drugs. The officer could not even get into the closet and had to put the dog in there because of how much stuff was in there. And the officer had to actually move a shelving unit to get back there, too. The drugs were not out in the open, visible but could only be seen when the officer got down and used a strong flashlight. All of this certainly lends credibility to the idea that White could have been living in the home without seeing or knowing about the large quantity of drugs hidden away.

Had the jury not heard the improper argument that it should find White less credible and thus convict because he failed to present evidence, it could easily have had questions about the credibility of Williams - a man who had set someone up and was trying to get out of paying a price for his

own criminal conduct. This is especially so in light of the glaring inconsistencies between what he said and what the officers said about things like whether Williams had previously even met "Tony" and thus could have known that "Tony" was a drug dealer in order to offer him as a target or whether Williams gave the drugs to the officer in the car or a totally different officer. The prosecution cannot meet the heavy burden of proving that this error is constitutionally harmless beyond a reasonable doubt. This Court should reverse and remand for a new trial.

2. IN THE ALTERNATIVE, THE SENTENCING ENHANCEMENTS MUST BE STRICKEN AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Even if this Court does not reverse and remand for a new trial based upon the improper argument by the prosecutor shifting a burden to Mr. White, reversal is still required because the sentencing enhancements were improperly imposed.

a. White's rights to trial by jury were violated and the sentencing court exceeded its authority in imposing the sentencing enhancement on Count II

First, the sentencing court exceeded its authority in imposing a school bus route stop enhancement for Count II, because the jury's special verdict did not support that enhancement and imposition of the enhancement violated White's Article I, §§ 21 and 22 and Sixth Amendment rights to trial by jury and to have the jury decide each fact which will increase his sentence, beyond a reasonable doubt.

Under Article I, §§ 21 and 22 and the Sixth Amendment, defendants have constitutional rights to trial by jury. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). As part of these

rights, under cases such as Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), it is required "that a sentence be authorized by the jury's verdict." Williams-Walker, 167 Wn.2d at 896. It is a violation of these fundamental rights - as well as due process - for a defendant to be subjected to a sentencing enhancement which was not properly submitted to and explicitly found by the jury. Id.

Williams-Walker is instructive. In Williams-Walker, the Court addressed consolidated cases in which the defendants were charged with firearm enhancements but the special verdict forms asked the juries to find only if the defendant was armed with a deadly weapon, not a firearm. 167 Wn.2d at 983-94. The sentencing courts had then imposed not the less serious deadly weapon enhancement submitted to and found by the jury but the greater "firearm" enhancement which had been charged. Id. For some of the courts, the prosecutor's error in submitting the wrong verdict form was fixable, because the underlying charges included use of a gun and thus, the courts reasoned, the juries in those cases must have found use of a firearm in order to convict. Williams-Walker, 167 Wn.2d at 898-90.

The Supreme Court disagreed. A "sentencing judge is bound by the jury's determination" on a special verdict, the Court held. Williams-Walker, 167 Wn.2d at 898. Further, a defendant has the constitutional right to have the jury make the required findings of fact before an enhancement can be imposed, the Court pointed out, noting that it had previously held that it was error to impose a firearm enhancement when only a deadly weapon enhancement was charged and submitted to the jury. Williams-Walker, 167 Wn.2d at 898.

As a result, the Supreme Court held, where the jury had found only that a deadly weapon was used in the commission of the crime, a firearm enhancement could not be imposed. Id. And this was so regardless whether a firearm enhancement was charged or the evidence might have supported such an enhancement. Id.

In reaching this conclusion, the Court explicitly rejected the prosecutor's argument that the sentencing courts could properly impose firearm enhancements rather than the deadly weapon enhancements submitted to and found by the jury based upon the particular facts of a case. Williams-Walker, 167 Wn.2d at 898-99. The prosecution had argued that, based upon the facts of several of the cases, "the juries implicitly found, by their guilty verdicts, that the defendant's committed the crimes using a firearm." Williams-Walker, 167 Wn.2d at 898-99. But even though the crimes in question required proof of a firearm for their commission, the Supreme Court refused to impute to jurors a factual finding on a special verdict based upon their general verdict of guilt:

> We decline to hold that guilty verdicts alone are sufficient to authorize sentence enhancements. If we adopted this logic, a sentencing court could disregard altogether the statutory requirement that the jury find the defendant's use of deadly weapon or firearm by special verdict. Such a result violates both the statutory requirements and the defendant's constitutional right to a jury trial.

Williams-Walker, 167 Wn.2d at 899. Relying on the underlying guilty verdicts instead of what the juries had actually found as their special verdict not only improperly "results in sentences unsupported by the juries' findings," the Supreme Court held, but violated the defendant's constitutional rights to trial. Id.

The Supreme Court summed up the fundamental principles of sentencing enhancements, as follows: "[f]or purposes of sentence enhancements, the sentencing court is bound by special verdict findings," and "[a] sentence enhancement must not only be alleged, it also must be authorized by the jury in the form of a special verdict." Id.

Thus, in this case, under Williams-Walker, the sentencing court was bound by the special verdict findings and was limited to imposing only sentence enhancements which were not only alleged but also authorized by the jury's specific findings on a special verdict form.

But the special verdict form for Count II did not authorize any enhancement, let alone the school bus route stop enhancement the sentencing court here imposed. The "school bus route stop enhancement" is defined in RCW 69.50.435(1)(c), which provides, in relevant part:

> Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401. . .
>
> Within one thousand feet of a school bus route stop designated by the school district;
>
> . . .
>
> may be punished by a fine of up to twice the fine otherwise authorized by this chapter. . . or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter[.]

Under RCW 9.94A.533(6), "[a]n additional twenty-four months shall be added" if a person commits a drug crime under RCW 69.50 RCW and a subsection of RCW 69.50.435 applies.

Thus, if the jury makes the required factual findings under RCW 69.50.435(1)(c), i.e., that the prohibited conduct occurred within the

required distance from the legally protected, properly designated bus stop, the sentencing court is then authorized to add the 24 months to the presumptive sentence. See State v. Coria, 120 Wn.2d 156, 162, 839 P.2d 890 (1992) (interpreting statute in its previous numerical iteration).

Here, however, the jury was not even **asked** to make the required finding as to Count II. The special verdict form for that count - proposed, drafted and submitted by the state - provided, as follows:

> (THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER AS CHARGED IN COUNT II)
>
> We, the jury, return a special verdict by answering as follows:
>
> QUESTION: Did the defendant possess a controlled substance with intent to deliver the controlled substance **at any location**?
>
> ANSWER: Yes (Write "yes" if unanimous agreement that this is the correct answer).

CP 82A (emphasis added).

The jury's finding of "yes" on this special verdict form does not support the 24-month "school bus route stop" enhancement the sentencing court imposed. Nothing in the special verdict form amounts to a finding that the crime occurred any particular distance from anything, let alone a place which meets the statutory requirements for being a "school bus route stop." Instead, the jury's only finding was that the possession with intent to deliver occurred "at any location" - which could be anywhere, either in or out of a protected zone and thus subject to an enhancement. That finding is binding on and limits the authority of the sentencing court under

Williams-Walker. Because the jury's verdict on the special verdict for Count II did not include the required factual findings to support a "school bus route stop" enhancements, the sentencing court exceeded its authority and erred in imposing such an enhancement for Count II in this case.

The enhancement for Count II must be stricken. Again, Williams-Walker is instructive. The Court noted that the error occurred "when the judge imposed a sentence not authorized by the jury's express findings," and that the authority of the court to impose an enhancement is limited to "looking to the jury's special findings," which bind the sentencing court. Any sentence which exceeds the authority of those findings, the Court held, "can never be harmless." Williams-Walker, 167 Wn.2d at 901; see also State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997) ("[w]hether the State produced sufficient evidence for a rational juror" to make the required factual finding on a special verdict "is irrelevant to whether the jury instruction" on that verdict was correctly drafted).

In response, the prosecution may attempt to rely on the special verdict form used for Count I or other jury instructions in arguing that the sentencing court should not be held to the special verdict form and finding submitted to the jury on Count II. Any such reliance would be misplaced.

First, such an argument would require a finding that the jurors somehow erred in rendering their special verdict on Count II. But it is presumed that jurors follow the instructions they are given. See In re Delgado, 149 Wn. App. 223, 237, 204 P.3d 936 (2009). And that is

exactly what they did.[2] The jurors were told that, if they found the defendant guilty of one of the crimes, they were to use the special verdict form pertaining to that crime "and fill in the blank with the answer "yes" or "no" according to the decision you reach." CP 80. For Count I, the count arising from the "buy" in January, the prosecution asked the jury to decide if the defendant delivered a controlled substance to a person "within one thousand feet of a school bus route stop designated by a school district[.]" CP 82. For Count II, however, the count arising from the search in February, the prosecution asked the jury only to decide if the defendant possessed a controlled substance with intent to deliver it "at any location." CP 82A. The jury answered those questions, just as they were asked to do. The fact that the prosecution did not ask the question it needed to ask in order to support the school bus route stop enhancement does not mean the jurors erred when answering as they were told to do.

Further, any attempt to argue that the special verdict on Count I should somehow control Count II would run afoul of the very instruction the prosecution itself gave. In drafting the special verdict forms, the prosecution specifically made sure that the jury was instructed to apply each special verdict form only to the count for which it applied. In each form, the prosecutor identified that count to which it applied i.e., "pertaining solely to Count I" or "pertaining solely to Count II." CP 82, 82A. And the prosecution then reiterated, in drafting the form, that each special verdict form was to be used for each specific count, telling the jury

[2]The flaw in the unanimity requirement of the special verdict instruction is discussed in more detail, *infra*.

"THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE AS CHARGED IN COUNT I" in the special verdict form for Count I, and similarly that "THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER AS CHARGED IN COUNT II" in the special verdict form II. CP 82, 82A. Further, the jurors were also instructed, in the jury instructions, that each count must be decided separately. See CP 59 (jury instruction 6).

Again, jurors are presumed to follow instructions. Delgado, 149 Wn. App. at 237. Given the specific language identifying the particular count for which each special verdict form applied, the prosecution cannot make even a marginally credible claim that jurors somehow thought that the special verdict form on Count I would also apply to Count II. And this is so regardless of the prosecution's error in failing to draft and submit to the jury a special verdict form for Count II which would support the enhancement the prosecution sought to have imposed.

Nor can the special verdict on Count I be used to impeach or set aside the verdict on Count II under the doctrine of "inconsistent verdicts." In fact, under that doctrine, even when verdicts are clearly inconsistent and directly conflict, one verdict cannot be used to so impeach another. See e.g., State v. Goins, 151 Wn.2d 728, 731, 92 P.3d 181 (2004). Our courts recognize that truly inconsistent verdicts show that "the jury somehow

erred in applying the jury instructions." 151 Wn.2d at 732. But courts give great deference to the possibility that lenity is the reason for a jury rendering verdicts which appear inconsistent. Goins, 151 Wn.2d at 732. In addition, courts honor the "traditional approach of exercising restraint from interfering with jury verdicts." 151 Wn.2d at 735. As a result, the "inconsistent verdicts" doctrine does not help the prosecution here.

Nor does the only jury instruction given on the special verdicts. That instruction, instruction 25, did not in some way make it clear that the jury was to decide anything other than what it was specifically asked to decide in the special verdict forms. Instead, that instruction again reiterated that each special verdict form was "pertaining solely" to each specific count, then just referred to the special verdict forms in general, not a "school bus route stop" special verdict. See CP 80 (special verdict form). Indeed, there were no instructions on the "school bus route stop" in particular - no definition of when something is designated as such a stop, no description of the protected zone, nothing. See CP 51-80 (court's instructions).

In short, the jury did what they were told. They answered the questions they were asked. The fact that the prosecution chose to ask the wrong question in the special verdict form for Count II does not change those facts. Nor does it change the unalterable fact that the jury's answer to the question posed in the special verdict form was insufficient to support imposition of a school bus route stop enhancement, under Williams-Walker. The sentencing court did not have the authority to impose a the 24-month term for that enhancement on Count II because it

was not supported by the jury's finding on the special verdict form that the possession with intent to deliver occurred "at any location." See CP 82A. And imposition of the enhancement without the jury having made the specific, required factual findings for this specific crime violated Mr. White's rights to trial by jury under Williams-Walker and Blakely. The 24-month enhancement added for Count II must therefore be stricken.

b. Both enhancements must be stricken as they were the result of improper, constitutionally deficient instructions; counsel was ineffective

The enhancements imposed for both Counts I and II must also be stricken under Bashaw, supra, and because they were the result of improper instructions which deprived White of his rights to the presumption of innocence and the benefit of any reasonable doubt. Jury instructions are reviewed de novo, to determine whether they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. See State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). In Bashaw, the Supreme Court declared, plainly, that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding" such as a special verdict. 169 Wn.2d at 146. Instead, unanimity is only required to find the "*presence* of a special finding" but "is not required to find the *absence* of such a special finding. 169 Wn.2d at 147 (emphasis in original); see also, State v. Goldberg, 149 Wn.2d 888, 890, 72 P.3d 1083 (2003).

Thus, not all jurors have to agree that the prosecution has not

proven the facts relating to a special verdict in order to answer it "no." This has the practical effect of ensuring that the defendant receives the benefit of any reasonable doubt - a benefit to which he is clearly entitled as part of the presumption of innocence. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, __ U.S. __, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). If some jurors have such doubts whether the state has met its burden of proving a special verdict, the special verdict is answered "no" and the defendant is given the benefit of those doubts.

Here, however, the special verdict instruction specifically and clearly told the jurors they had to be unanimous not only to answer "yes" on the special verdict forms, but also "no," as follows:

> If you find the defendant guilty of a particular one of those crimes, you will then use the special verdict form pertaining to that crime, and fill in the blank with the answer "yes" or "no" according to the decision you reach. **Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms.** In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. **If you unanimously have a reasonable doubt as to this question, you must answer "no."**

CP 80 (emphasis added).

Under Bashaw, by telling the jurors they had to be unanimous in order to answer the special verdict not only "yes" but also "no," Instruction 25 misstated the law. In addition, although the Bashaw Court did not explicitly so hold, the instruction deprived White of the benefit of any reasonable doubt and the presumption of innocence. That presumption is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). A defendant is

constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. Warren, 165 Wn.2d at 26-27. In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer "yes" but also to answer "no" deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, "jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result." 169 Wn.2d at 147-48.

Dismissal of the special verdict is thus required, regardless whether the Court orders relief on the other issue raised herein. As the Bashaw Court noted, when the jury is improperly instructed in this way, the deliberative process is so "flawed" that it is not possible to "say with any confidence what might have occurred had the jury been properly instructed." 169 Wn.2d at 147-48. As a result, a reviewing court "cannot conclude beyond a reasonable doubt that the jury instruction error was harmless." 169 Wn.2d at 148.

Notably, the Bashaw Court reached this conclusion even though it had already found that there was sufficient evidence to uphold two of the three special verdicts in that case, despite evidentiary errors. 169 Wn.2d at 143-48. In Bashaw, there were three "school bus route stop" enhancements, one for each of three counts of delivery of a controlled substance. 169 Wn.2d at 140-42. The prosecution relied on evidence from a measuring device which was not properly shown to be reliable. Id. The measuring device indicated that the three deliveries occurred 1) within

924 feet of a school bus route stop, 2) within 100 feet of a school bus route stop and 3) within 150 feet of a school bus route stop. 169 Wn.2d at 142-43). Officers also testified that the first delivery was approximately 1/10 mile (528 feet) or 1/4 mile (1,320 feet) from the stop. 169 Wn.2d at 143-44.

On appeal, the Court first found that there was "no reasonable probability" that error in admitting the faulty measuring device readings was harmful for two of the enhancements because there was "no reasonable probability" the jury would have concluded those deliveries had not taken place within 1,000 feet of the stop even if the device evidence had been excluded. 169 Wn.2d at 144-45.

Yet that same evidence did not save the enhancements from being reversed based upon the error in instructing the jury that they had to be unanimous in order to answer the special verdict form "no," just as the jury was instructed here. 169 Wn.2d at 145-47; see CP 80. Thus, the Bashaw Court made it clear that the question was not whether there was evidence to support the enhancement but rather whether the procedure in gaining the verdict rendered it fundamentally flawed. 169 Wn.2d at 147-48. Because this type of instruction renders the deliberative process itself "flawed," our Supreme Court has held that it is not possible to "say with any confidence what might have occurred had the jury been properly instructed." 169 Wn.2d at 147-48. As a result, a reviewing court "cannot conclude beyond a reasonable doubt that the jury instruction error was harmless" and the sentencing enhancements thus must be stricken. See Bashaw, 169 Wn.2d at 148.

Here, just in Bashaw, the improper instruction tainted the entire deliberative process. And as in Bashaw, the question is not whether there is sufficient evidence upon which the jurors could have relied in entering a "yes" verdict on the special verdict, nor is it whether this Court thinks the evidence on this point might be strong. Because the jury instruction was improper under Bashaw and deprived White of his rights to the presumption of innocence and to the benefit of every reasonable doubt, reversal and dismissal of the special verdicts and resulting enhancements is required.

In response, the prosecution may attempt to rely on a line of cases stemming from a decision in Division Three, State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2001), review granted, __ Wn.2d __ (August 9, 2011) (2011 WL 3523949). Any such attempt should be rejected. In Nunez and its progeny, Division Three has deprived appellants of the application of the holding of Bashaw to their cases because their attorneys did not raise the issue below as Bashaw had not yet been decided. Nunez, 160 Wn. App. at 157-58. But the defendant in Nunez made no legitimate constitutional argument, and the instruction in that case was much less problematic, telling jurors only that they had to "agree" in order to answer the special verdict questions rather than, as here, telling them they had to unanimously have a reasonable doubt in order to answer the special verdict "no." 160 Wn. App. at 157-58.

Further, frankly, Nunez was simply wrongly decided. That case and its progeny depend upon the conclusion of Division Three that the decision in Bashaw was not based upon constitutional principles. 160 Wn.

App. at 160-64. But Division One, looking at the very same decision, reached the opposite conclusion. See State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011), review granted, __ Wn.2d __ (August 9, 2011) (2011 WL 3523833). While recognizing that Bashaw applied a constitutional harmless error analysis to the issue, Division Three apparently concluded that the Supreme Court did not mean to do so because it did not them announce a specific "constitutional basis for its decision." Nunez, 160 Wn. App. at 160-64. But Division One noted that the Bashaw decision "strongly suggests its decision is grounded in due process," not only using the constitutional harmless error standard but also talking about error in the "deliberative process" and "the procedure by which unanimity" was achieved - both constitutional issues. Ryan, 160 Wn. App. at 897. Further, the Ryan Court pointed out, the Bashaw Court "refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. Ryan, 160 Wn. App. at 897.

And although it was not mentioned by Ryan Court, there is yet another reason to believe that the holding of Bashaw regarding the flawed instruction on unanimity was constitutionally based. The Court specifically found that the evidence supporting the special verdicts was so strong for two of the three special verdicts that it would have affirmed those two verdicts, despite error in admitting evidence - a nonconstitutional error. Bashaw, 169 Wn.2d at 143-44; see State v. Hamlet, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997). If the error in improperly instructing the jury that it had to be unanimous in order to find that the state had not proven a special verdict beyond a reasonable doubt

was not constitutional, obviously, the Bashaw Court had already found the evidence sufficient to overcome such error.

This Court should follow Division One and the spirit and holding of Bashaw and should reject any effort by the prosecution to avoid application of the holding of Bashaw to this case.

And in any event, this case presents questions about White's rights to the presumption of innocence and to the benefit of any reasonable doubt which were not explicitly addressed in Bashaw.

There is a final point which needs to be made on this issue. The fact that Instruction 25 was given in this case is especially troubling given the timing. White's trial started on November 3, 2010. See RP 1. The jury instructions were given on November 10, 2010. CP 51-80. But Bashaw was decided on July 1, 2010, fully four months before. See Bashaw, 169 Wn.2d at 234.

It is not only surprising but also somewhat disheartening that a case specifically disavowing a jury instruction was decided by the highest court in this state four months before a trial and yet the prosecutor would still propose that a court give essentially that same instruction - and that the court would give it.

But even more disturbing is the light this casts on defense counsel's performance in this case. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70,

127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. It is well-settled that, to be effective, counsel has a duty to be aware of the law relevant to his client's case. See, State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Strickland, 466 U.S. at 690-91. Bashaw, decided well before White's trial, was obviously just such law. And in fact, Bashaw also involved school bus route stop enhancements - the same enhancements as here. Bashaw, 169 Wn.2d at 140-41. Yet counsel - and the court, and the prosecutor - inexplicably, utterly failed to note that the special verdict instruction given here runs directly afoul of the Supreme Court's holding in Bashaw. Had counsel been aware of the relevant law, however, he could have informed the court and the prosecutor of the problems with the instruction. Had he done so, the jury would not have been instructed in a way that was improper and deprived his client of the benefit of the doubt and the presumption of innocence in way which, under Bashaw, it is impossible to find harmless.

It is one thing not to raise an argument which is still being developed and on which a penultimate appellate court has not ruled. See State v. Brown, 159 Wn. App. 366, 372, 245 P.3d 776 (2011) (counsel is not ineffective for failing to anticipate changes in the law). It is another thing entirely to not raise an argument which is based upon recent, current, existing and precedential law, which applies directly to the facts of your case without any mental gymnastics required.

If this Court grants a new trial based on any of the arguments presented herein, it should do so with instructions that a correct instruction must be used on remand. In addition, even if the Court does not grant

relief on any of the other grounds presented herein, dismissal of the special verdicts and remand for resentencing to strike the enhancements is still required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial. In the alternative, both special verdicts must be stricken.

DATED this 17th day of August, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Tony White, DOC 789827, Airway Heights CC, P.O. Box 1899, Airway Heights, WA. 99001-1899.

DATED this 17th day of August, 2011.

KATHRYN RUSSELL SELK, No. 23879
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INSTRUCTION NO. 15

You will also be given two special verdict forms: Special Verdict Form I, pertaining solely to Unlawfully Delivery of a Controlled Substance as charged in Count I; Special Verdict Form II, pertaining solely to Unlawful Possession of a Controlled Substance with Intent to Deliver as charged in Count II. If you find the defendant not guilty of a particular one of those crimes, do not use the special verdict form pertaining to that crime. If you find the defendant guilty of a particular one of those crimes, you will then use the special verdict form pertaining to that crime, and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

10-1-00767-1 35371618 SVRD 11-12-10

FILED
DEPT. 1
IN OPEN COURT
NOV 10 2010
By DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. TONY KIM WHITE Defendant.	CAUSE NO. 10-1-00767-1 **SPECIAL VERDICT FORM I** (pertaining solely to Count I)

(THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE AS CHARGED IN COUNT I)

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?

ANSWER: YES (Write "yes" if unanimous agreement that this is the correct answer)

10 Nov '10
DATE

PRESIDING JUROR

The answer section above has been intentionally left blank.

DATE

PRESIDING JUROR

10-1-00767-1 35371646 SVRD 11-12-10

FILED
DEPT. 1
IN OPEN COURT
NOV 10 2010
BY DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. TONY KIM WHITE Defendant.	CAUSE NO. 10-1-00767-1 **SPECIAL VERDICT FORM II** (pertaining solely to Count II)

(THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER AS CHARGED IN COUNT II)

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant possess a controlled substance with intent to deliver the controlled substance at any location?

ANSWER: YES (Write "yes" if unanimous agreement that this is the correct answer)

10 NOV '10
DATE

PRESIDING JUROR

The answer section above has been intentionally left blank.

DATE

PRESIDING JUROR